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No. 06- 06-521

IN THE

Supreme Court of the United States

THOMAS J. ROSBY and JOHN M. FRANKLIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit erred in determining that a jury instruction defining the required element of materiality under the federal mail and wire fraud statutes was proper, even though the instruction directed the jury to ignore what the alleged victims knew about the accuracy of the alleged misrepresentations?

2. Whether this Court should resolve the circuit split as to whether *United States v. Booker*, 543 U.S. 220 (2005), rendered Federal Sentencing Guideline departure methodology obsolete, and whether the United States Court of Appeals for the Seventh Circuit was wrong in failing to follow its own precedent by finding that the district court did not plainly err in using departure methodology at sentencing?

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The Petitioners, Thomas J. Rosby and John M. Franklin, respectfully submit this Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on July 19, 2006.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 454 F.3d 670 (7th Cir. 2006) and is reprinted in the Appendix hereto at page 1a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit affirmed Petitioners' convictions and sentences on July 19, 2006. Petitioners did not seek a rehearing. This Court has jurisdiction to review the Seventh Circuit's decision under 28 U.S.C. § 1254(1).

STATUTORY AUTHORITY INVOLVED[1]

I. 18 U.S.C. § 1341 (1994)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any

1. 18 U.S.C. §§ 1341 and 1343, quoted in this section, have been amended. This section quotes the prior statutory language applied in the present case, both for substantive law and sentencing purposes.

post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

II. 18 U.S.C. § 1343 (1994)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

III. 18 U.S.C. § 3553(a)

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be

incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised released, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be

incorporated by the Sentencing Commission into amendments issued under sectic ı 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

On January 19, 2001, a grand jury returned a ten-count indictment charging Thomas J. Rosby ("Mr. Rosby") and John M. Franklin ("Mr. Franklin") with one count of conspiracy under 18 U.S.C. § 371 (Count 1), six counts of wire fraud under 18 U.S.C. § 1343 (Counts 2-7), and three counts of mail fraud under 18 U.S.C. § 1341 (Counts 8-10). Indictment at 5-22. The government later dismissed Count 5 of the indictment. District Court Docket at 15-16. Messrs. Rosby and Franklin entered not guilty pleas. *Id.* at 18. On November 4, 2002, they proceeded to trial on the remaining nine counts. *Id.* at 25-26. The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

On November 20, 2002, the jury returned a verdict of guilty on all counts against Messrs. Rosby and Franklin. District Court Docket at 29. The district court sentenced Mr. Rosby on April

21, 2005. *Id.* at 42-43. The court entered its judgment and commitment order concerning Mr. Rosby the same day, and an amended judgment on August 5, 2005. District Court Judgment (Rosby); Amended District Court Judgment (Rosby). The district court sentenced Mr. Franklin on April 28, 2005. District Court Docket at 45-46. The court entered its judgment concerning Mr. Franklin the same day. District Court Judgment (Franklin).

Mr. Rosby filed a timely Notice of Appeal on April 26, 2005. District Court Docket at 44-45. Mr. Franklin filed a timely Notice of Appeal on April 29, 2005. *Id.* at 46. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Mr. Rosby was president, chief executive officer and a director of Monon Corporation ("Monon"), a manufacturer of over-the-road semi-trailers. Indictment at 1-2. Mr. Franklin was executive vice-president, chief financial officer, and a director of Monon. *Id.* at 2. The indictment alleged, first, that Messrs. Rosby and Franklin devised a scheme to defraud two insurance premium finance lenders, A.I. Credit Corp. ("A.I. Credit") and Anthem Premium Finance ("Anthem"), for the purpose of inducing them to loan money to Monon. *Id.* at 2-4, 6. The substance of the alleged misrepresentations pertained to the existence and amount of workmen's compensation insurance premiums Monon was required to pay, and Monon's intent to use loan proceeds to finance annual insurance premiums. *Id.* at 6.

Second, the indictment alleged that Messrs. Rosby and Franklin devised a scheme to defraud Monon's revolving credit lender, Congress Financial Corporation ("Congress"), for the purpose of inducing Congress to loan money to Monon. *Id.* at 6-7. The substance of the alleged misrepresentations

concerned the amount of Monon's accounts receivable. *Id.* The indictment period ran from March through August of 1996. *Id.*

As previously noted, on November 20, 2002, the jury returned a verdict of guilty against Messrs. Rosby and Franklin on one conspiracy count, 18 U.S.C. § 371, five wire fraud counts, 18 U.S.C. § 1343, and three mail fraud counts, 18 U.S.C. § 1341. The wire fraud counts pertained to the alleged scheme concerning A.I. Credit and Anthem. The mail fraud counts pertained to the alleged scheme concerning Congress. *Id.* at 10-22. Messrs. Rosby and Franklin were both sentenced to a total term of 87 months in prison. Amended District Court Judgment (Rosby) at 2; District Court Judgment (Franklin) at 2. They were both ordered to pay a total of $8,646,394 in restitution, $1,979,893 to A.I. Credit, $4,866,501 to Anthem, and $1,800,000 to Congress. Amended District Court Judgment (Rosby) at 4; District Court Judgment (Franklin) at 4.

As discussed in greater detail below, at trial, Messrs. Rosby and Franklin presented evidence that each of the recipients of the alleged misrepresentations, A.I. Credit, Anthem, and Congress, either knew the truth about the matters allegedly misrepresented, or deliberately chose to ignore readily available information concerning the accuracy of the alleged misrepresentations. According to *Neder v. United States*, 527 U.S. 1, 25 (1999), materiality is an essential element of mail fraud and wire fraud. Furthermore, under the mail and wire fraud statutes, materiality is defined as it is defined by the common law. *Neder*, 527 U.S. at 21-22. The common law definition of materiality contemplates, in turn, that when the recipient of a misrepresentation acts with knowledge of its falsity, or deliberately disregards information concerning the accuracy of the alleged misrepresentation, the misrepresentation must be, and is, immaterial. *See, e.g., Sass v. Andrew*, 152 Md.

App. 406, 440, 832 A.2d 247, 266 (2003); *Jeffrey M. Goldberg & Associates, Ltd. v. Collins & Tuttle Co., Inc.*, 264 Ill. App. 3d 878, 855, 637 N.E.2d 1103, 1108 (1st Dist. 1994); *see also United States v. Brown*, 79 F.3d 1550, 1559 (11th Cir. 1996); *Mayer v. Spanel International, Ltd.*, 51 F.3d 670, 676 (7th Cir. 1995); *North American Financial Group, Ltd. v. S.M.R. Enterprises, Inc.*, 583 F. Supp. 691, 698 (N.D. Ill. 1984).

In this case, the district court failed to instruct the jury properly with respect to the required element of materiality. The jury instruction defining materiality that the government proposed, and the district court adopted, derives from the definition of materiality under a federal statute, 18 U.S.C. § 1001, concerning false statements to the federal government. It does not derive from the common law definition of materiality, as *Neder* requires. 527 U.S. at 22-23. The distinction makes a difference because, according to the 18 U.S.C. § 1001 definition of materiality, in direct contrast to the applicable common law definition of materiality, even a recipient's *actual knowledge* of the falsity of an alleged misrepresentation is entirely irrelevant to the factual determination of whether the alleged misrepresentation was material. *See, e.g., United States v. Whitaker*, 848 F.2d 914, 916 (8th Cir. 1988).

Messrs. Rosby and Franklin challenged their convictions on appeal by arguing, among other things, that the materiality instruction was improper because it failed to direct the jury to take into account what the recipients of the alleged misrepresentations knew, and what information they deliberately chose to disregard, about the accuracy of the alleged misrepresentations. Appellants' Joint Opening Brief at 23-27. The United States Court of Appeals for the Seventh Circuit rejected this argument and others raised by Messrs. Rosby and Franklin in an opinion issued on July 19, 2006. Appendix, 13a. In so doing, and as explained more fully below, the Seventh

Circuit committed a fundamental error. This is because, under the applicable common law definition of materiality, the instruction defining materiality in a mail or wire fraud case must direct the jury to consider what the recipients knew about the alleged misrepresentations, and what information they deliberately chose to ignore about the alleged misrepresentations.

Moreover, in this case, the district court incorrectly employed departure methodology when it sentenced Messrs. Rosby and Franklin. On appeal, Messrs. Rosby and Franklin argued that based on intervening Seventh Circuit case law, the district court's use of departure methodology was improper. Appellants' Joint Opening Brief at 38-40. The Seventh Circuit rejected this argument. Appendix, 13a. As discussed in greater detail below, the district court committed plain error by employing departure methodology because, as the Seventh and Ninth Circuits have repeatedly held, *United States v. Booker*, 543 U.S. 220 (2005), made departure methodology obsolete.

II. FACTUAL BACKGROUND

A. The Materiality Instruction

A.I. Credit and Anthem are premium finance lenders in the business of loaning money for the purpose of financing commercial insurance at premiums. Trial Transcript Vol. 8 at 186:3-10; Vol. 11 at 82:2-4, 82:24-83:10. As previously noted, according to the indictment, Messrs. Rosby and Franklin misrepresented to A.I. Credit and Anthem the amount of workmen's compensation insurance premiums Monon was required to pay, and Monon's intent to use loan proceeds to finance annual insurance premiums. Indictment at 6. At trial, there was evidence that A.I. Credit and Anthem either were aware of the truth, or deliberately disregarded information

bearing directly on the accuracy of the alleged misrepresentations.

By way of example, before any of the loans that occurred during the indictment period, A.I. Credit was specifically aware that Monon was customarily using proceeds of other A.I. Credit premium financing loans to cover operating expenses, and not to finance insurance premiums. In fact, about one year before the indictment period, A.I. Credit loaned Monon money knowing, and having been clearly informed, that Monon would retain $1.5 million of the loan, not to finance insurance premiums, but to pay other operating expenses. Trial Transcript Vol. 11 at 20:10-21:13, 49:19-50:12.

Cindy Carroll was the branch manager at A.I. Credit's Boston office in 1995, and also in 1996 when A.I. Credit made loans to Monon during the indictment period. Trial Transcript Vol. 11 at 113:11-14, 136:2-137:1. The two A.I. Credit loans that occurred during the indictment period originated out of A.I. Credit's Boston office. Trial transcript Vol. 11 at 113:15-18. In the spring of 1995, A.I. Credit loaned Monon $4,615,000 knowing that the loan constituted overfunding—*i.e.*, funding in excess of Monon's insurance premium obligations—and knowing that Monon intended to retain $1.5 million of the loan proceeds for its own use, and not to pay insurance premiums. Trial Transcript Vol. 11 at 20:10-21:13, 49:19-50:12. Not only did A.I. Credit know it was overfunding Monon's insurance premium obligations, and that Monon would retain $1.5 million in loan proceeds for its own use, but it actively enlisted the assistance of Monon's workmen's compensation insurer, Mutual Indemnity, Limited, to ensure that the portion of the loan proceeds constituting overfunding would be disbursed to Monon. Trial Transcript Vol. 11 at 21:14-22:25, 23:10-24, 24:24-25:19.

In addition, one of the government's own witnesses who had entered into a plea agreement testified that he believed A.I. Credit knew Monon's use of loan proceeds for purposes other than insurance premium financing was an ongoing practice. Trial Transcript Vol. 11 at 78:6-16. Thus, the evidence at trial was that, in 1995, about one year before the indictment period, A.I. Credit entered into a relationship with Monon pursuant to which A.I. Credit (1) knowingly provided financing to Monon in excess of Monon's insurance premium obligations; (2) knowingly consented to Monon's use of loan proceeds for purposes other than insurance premium financing; and (3) enlisted the assistance of Monon's workmen's compensation insurer, Mutual Indemnity, Limited, to provide Monon with loan proceeds in excess of Monon's insurance premium obligations. In other words, prior to the indictment period, A.I. Credit was aware of that which was allegedly misrepresented.

Despite the evidence, the jury instruction defining materiality that the government proposed and the district court adopted was designed to direct the jury to disregard what the recipients of the alleged misrepresentations knew, and what information they deliberately disregarded, concerning the alleged misrepresentations. Specifically, the jury instruction that was given regarding materiality was as follows:

> A statement is material if it had the effect of influencing the action of a lender, or was capable or had the potential to do so. It is not necessary that the statement actually have that influence or be relied on by the lender, so long as it had the potential or capability to do so.

Government's Proposed Instruction No. 28. According to the government, this instruction derives from a Seventh Circuit

Pattern Jury Instruction covering 18 U.S.C. § 542 (Government's Proposed Instruction No. 28), a statutory provision which criminalizes false statements in connection with the entry of goods into United States commerce. The relevant pattern jury instruction for 18 U.S.C. § 542 notes, in turn, that this instruction is derived from the pattern jury instruction defining materiality under 18 U.S.C. § 1001. *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* at 165. Indeed, the instruction that the government offered and that the district court adopted is substantially identical to the Seventh Circuit Pattern Jury Instruction defining materiality under 18 U.S.C. § 1001. *Id.* at 201.

This is significant because the instruction the district court gave defining materiality derives from a federal statute, 18 U.S.C. § 1001, concerning false statements to the federal government, and not from the common law of fraud, as this Court required in *Neder*. *See Neder*, 527 U.S. at 22-23. This distinction makes a difference. Title 18 U.S.C. § 1001 is intended to promote the smooth functioning of government, and the expeditious processing of government business, by establishing a blanket proscription against the making of false statements to federal agencies. *United States v. Arcadipane*, 41 F.3d 1, 4-5 (1st Cir. 1994). A mere false statement is at the foundation of a violation of 18 U.S.C. § 1001, but a scheme to defraud is essential for a conviction under the mail fraud statute. *United States v. Azad*, 809 F.2d 291, 296 (6th Cir. 1987).

Furthermore, under 18 U.S.C. § 1001, a false statement is material *even if* the recipient knew the statement was false:

> The issue is whether the statements, viewed alone, were capable of influencing the function of the FDIC. It is irrelevant what the agent who heard the statement knew at the time the statement was made

> A false statement can be material even if the agent to whom it is made knows that it is false.

United States v. Whitaker, 848 F.2d 914, 916 (8th Cir. 1988) (discussing materiality requirement under 18 U.S.C. § 1001); *see also United States v. Goldfine*, 538 F.2d 815, 820-21 (9th Cir. 1976) (false statements in response to questions posed by DEA agents were material under 18 U.S.C. § 1001 even though agents knew the truth and were not deceived); *United States v. Picket*, 209 F. Supp. 2d 84, 87-88 (D.D.C. 2002) (false statements material under 18 U.S.C. § 1001 despite abundant evidence that no government actor was deceived).

Thus, the instruction given at trial improperly conveyed to the jury the 18 U.S.C. § 1001 definition of materiality, which, in contrast to the applicable common law definition of materiality, contemplates a finding of materiality regardless of the recipient's knowledge, even if the recipient knew the statement was false. *Whitaker*, 848 F.2d at 916; *Goldfine*, 538 F.2d at 820-21; *Picket*, 209. F. Supp. 2d at 87-88.

B. The District Court's Use of Departure Methodology

When it sentenced Messrs. Rosby and Franklin, the district court employed the old Federal Sentencing Guideline departure methodology, which was in force before *United States v. Booker*, 543 U.S. 220 (2005), when the Guidelines were still mandatory. For example, when it sentenced Mr. Rosby the district court stated:

> Even though *departure* is authorized in this case, in the exercise of its direction, the court will not *depart*, because, I believe, *departure* is not warranted under the facts and circumstances of this case.

Rosby Sentencing Transcript at 119:15-20. Although Petitioners did not challenge the district court's use of departure methodology at sentencing (since the Seventh Circuit had not yet interpreted *Booker* to have rendered departure methodology obsolete), it constitutes plain error in light of *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005), according to which departure methodology no longer applies.

REASONS FOR GRANTING THE PETITION

I. THE MATERIALITY INSTRUCTION GIVEN AT TRIAL IS FUNDAMENTALLY AT ODDS WITH THE LEGALLY APPLICABLE COMMON LAW DEFINITION OF MATERIALITY

Although no objection was raised to the materiality instruction at trial, it is clear that the Seventh Circuit committed a fundamental error by rejecting Petitioners' challenge on appeal. When no objection was raised at trial as to a disputed jury instruction, a plain error standard of review applies. *United States v. Olano*, 507 U.S. 725, 732-34 (1993). The error must be clear under current law. *Olano*, 507 U.S. at 734. Furthermore, the error must affect substantial rights; for example, when the clear possibility exists that a defendant might have been found not guilty had the jury been instructed properly. *United States v. Holmes*, 93 F.3d 289, 294 (7th Cir. 1996).

The error regarding the materiality instruction was clear under current law. In a mail or wire fraud case, the common law defines the required element of materiality. *Neder*, 527 U.S. 21-22. The materiality instruction given in the present case was based on 18 U.S.C. § 1001, according to which the recipient's knowledge concerning the alleged misrepresentations makes no difference. *See, e.g., Whitaker*, 848 F.2d at 916. By contrast, according to the legally applicable common law definition of

materiality, the recipient's knowledge concerning the alleged misrepresentations is determinative. For example, according to the common law of fraud, an alleged misrepresentation is material *only if* the alleged victim could reasonably have relied on it. *Jeffrey M. Goldberg & Associates, Ltd. v. Collins & Tuttle Co., Inc.*, 264 Ill. App. 3d 878, 885, 637 N.E.2d 1103, 1108 (1st Dist. 1994); *State Security Insurance Co. v. Frank V. Hall & Co.*, 258 Ill. App. 3d 558, 592, 630 N.E.2d 940, 943 (1st Dist. 1994).

Furthermore, materiality, at common law, can only be defined in the context of the transaction between the parties. *Lidecker v. Kendall College*, 194 Ill. App. 3d 309, 316, 550 N.E.2d 1121, 1125 (1st Dist. 1990). In determining whether there could have been reasonable reliance, and therefore whether any material misrepresentation could have been made, it is necessary to consider all of the facts within the alleged victim's actual knowledge, as well as those which could have been discovered by the exercise of ordinary prudence. *Neptune Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor*, 295 Ill. App. 3d 567, 575, 692 N.E.2d 812, 818 (1st Dist. 1998).

When ample opportunity existed to discover the truth of the matters allegedly misrepresented, there can be no reasonable reliance on the alleged misrepresentation and, consequently, the matters allegedly misrepresented are not material. *Cappiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 939, 791 N.E.2d 553, 563 (2d Dist. 2003); *Miller v. Williams Chevrolet/ GEO, Inc.*, 326 Ill. App. 3d 642, 651, 762 N.E.2d 1, 9 (1st Dist. 2001); *Central States Joint Board v. Continental Assurance Co.*, 171 Ill. App. 3d 600, 607, 458 N.E.2d 932, 937 (1st Dist. 1983); *see also Bundesen v. Lewis*, 368 Ill. 623, 636, 15 N.E.2d 520, 526 (1938) (no reasonable reliance when alleged victim "has ample opportunity to ascertain the truth of the representations before he acts."); *Dickinson v. Dickinson*, 305 Ill. 521, 527,

137 N.E. 468, 470 (1922) (same); *Ward v. Luneen*, 1887 WL 5753, *3 (Ill. App. 1886) (no reasonable reliance concerning any matter which, by ordinary care, could have been detected).[2]

The federal courts have similarly determined that if the recipient of an alleged misrepresentation was aware that it was false, or deliberately ignored information bearing on the veracity of an alleged misrepresentation, the alleged misrepresentation cannot be material. For example:

> [A]n investor cannot close his eyes to a known risk. If the investor possesses sufficient information to call the representation into question, he cannot claim

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2. Cases from other jurisdictions across time confirm that according to the common law definition of fraud, there can be no fraud if the recipient of the alleged misrepresentation either knew the true facts or reasonably could have ascertained them. *See, e.g., Sass v. Andrew*, 152 Md. App. 406, 440, 832 A.2d 247, 266 (2003) (under Maryland law misrepresentation "is generally immaterial if the party to whom it is made reasonably could have ascertained the true facts."); *Sado v. Ellis*, 882 F. Supp. 1401, 1407 (S.D.N.Y. 1995) (under New York law, no fraud where party could have discovered truth with ordinary diligence); *Federal Deposit Insurance Corp. v. Lauterbach*, 626 F.2d 1327, 1334 (7th Cir. 1980) (under Wisconsin law, no fraud where truth could have been discovered through exercise of ordinary care); *Peery v. Hansen*, 120 Ariz. 266, 269, 585 P.2d 574, 577 (2d Div. 1978) (under Arizona law, no fraud where recipient of alleged misrepresentation knew or reasonably should have known truth); *Scott v. Fulton Nat. Bank of Atlanta*, 92 Ga. App. 741, 744, 89 S.E.2d 892, 894 (1st Div. 1955) (under Georgia law, no fraud where reasonable diligence would have revealed truth); *Williams v. Bisson*, 142 Me. 83, 84, 46 A.2d 708, 709 (1946) (under Maine law, no fraud where plaintiff knew alleged misrepresentations were false or could have discovered truth by exercise of reasonable care); *Morrill v. Madden*, 35 Minn. 493, 495, 29 N.W. 193, 194 (1886) (under Minnesota law, no fraud where ordinary prudence would have revealed truth).

> later that he relied on or was deceived by the lie. This is not because he has a duty to investigate lies or prevent intentional torts, though; it is, rather, because the false statement is not material under the circumstances.

Mayer v. Spanel International, Ltd., 51 F.3d 670, 676 (7th Cir. 1995); *see also United States v. Brown*, 79 F.3d 1550, 1559 (11th Cir. 1996) (no reasonable juror could find that "scheme to defraud" under federal mail fraud statute was proved when falsity of alleged misrepresentations could have been discovered by consulting readily available information); *North American Financial Group, Ltd. v. S.M.R. Enterprises, Inc.*, 583 F. Supp. 691, 698 (N.D. Ill. 1984) (when recipient of alleged misrepresentation was aware of truth, alleged misrepresentation makes no difference, and materiality cannot be shown).

In this case, the materiality instruction, based on 18 U.S.C. § 1001, was calculated to direct the jury to ignore what A.I. Credit, Anthem, and Congress knew, and what information they deliberately disregarded, concerning the alleged misrepresentations. The materiality instruction thus directly contradicted the legally applicable common law definition of materiality, according to which the recipient's knowledge concerning the alleged misrepresentations is determinative. The materiality instruction was therefore clearly erroneous under current law.

Moreover, the error affects substantial rights, for there is a clear possibility that Petitioners might have been found not guilty had the jury been instructed properly. For example, A.I. Credit knew prior to the indictment period that it was loaning Monon money in excess of Monon's insurance premium financing obligations, and that Monon was using A.I. Credit loan proceeds for purposes other than insurance premium financing. Trial

Transcript Vol. 11 at 20:10-21:13, 49:19-50:12. These are the very same matters about which A.I. Credit was allegedly deceived. Indictment at 6. Had the jury been instructed to take into account what A.I. Credit knew about the alleged misrepresentations under the legally applicable common law definition of materiality, rather than to ignore what A.I. Credit knew under the incorrect 18 U.S.C. § 1001 definition of materiality, it is likely that Messrs. Rosby and Franklin would have been found not guilty.

II. THE DISTRICT COURT'S USE OF DEPARTURE METHODOLOGY AT SENTENCING CONSTITUTES PLAIN ERROR

The circuits are split as to whether *United States v. Booker*, 543 U.S. 220 (2005), made Federal Sentencing Guideline departure methodology obsolete. In *Booker*, this Court held the Federal Sentencing Guidelines ("the Guidelines") to be advisory. *Id.* at 226-27. Since that decision, "[a]chieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow." *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006). Specifically, two circuits have determined that *Booker* effectively rendered traditional departure analysis obsolete, while six others have found that it remains intact. Such inconsistency in federal sentencing should not continue. This Court needs to clarify the law and resolve the dispute.

The Seventh and Ninth Circuits correctly hold that *Booker* rendered Guideline departures in federal sentencing obsolete. *See United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005); *see also United States v. Mohamed*, 459 F.3d 979, 977 (9th Cir. 2006). However, a majority of circuits incorrectly conclude that sentencing courts must still consider departures. *See McBride*, 434 F.3d at 477; *United States v. Moreland*, 437 F.3d 424, 433

(4th Cir. 2006); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005); *United States v. Sierra-Castillo*, 405 F.3d 932, 939 n.5 (10th Cir. 2005). These circuits reason that as part of a Guideline structure that still requires consultation, departures remain "a relevant consideration for determining the appropriate Guideline sentence." *McBride*, 434 F.3d at 477. The majority of circuits, however, fail to appreciate the distinction between a relevant consideration and controlling authority.

In *Booker*, 543 U.S. at 226, this Court invalidated two provisions of the Guidelines that had the effect of making them mandatory. It nonetheless instructed district courts that while they were no longer bound to apply the Guidelines, they were still required to "consult [them] and take them into account when sentencing." *Id.* at 264. The Court explained that instead of using traditional analysis, courts of appeals should now review "sentencing decisions for unreasonableness." *Id.* Essentially, this Court transformed once dispositive sentencing rules into relevant recommendations.

Consequently, while departures once permitted deviation from the formerly mandatory guidelines, they are no longer necessary in a post-*Booker* regime. *Mohamed*, 459 F.3d at 986. Previously, departures were used "to define narrowly the limits within which the district courts could impose sentences outside [the] mandatory guidelines." *Id.* But now post-*Booker* "district courts enjoy authority, within the bounds of reason, to impose sentences that fall inside or outside the now-advisory guidelines." *Id.* Therefore, district courts need not formally "depart" from Guidelines they need not actually follow.

Rather, *Booker*'s command to issue reasonable sentences has replaced the previous departure system. *United States v.*

Coppola, 2006 WL 2460804, *5 (9th Cir. Aug. 24, 2006) (citing *Mohamed*, 459 F.3d at 986). Post-*Booker* departures should be understood as simply "an exercise of . . . discretion to sentence a defendant outside the applicable guidelines range" that is uniformly reviewed for reasonableness. *Id.* This approach properly avoids two practical ramifications that the majority of circuits ignore.

First, finding an appropriate sentence using both pre-*Booker* departure methodology and the post-*Booker* reasonableness standard is unduly repetitious. In arriving at a reasonable sentence, district courts will "necessarily take into consideration many of the factors enumerated in Section 5K of the Sentencing Guidelines." *Mohammed*, 459 F.3d at 986. But "to require two exercises—one to calculate what departure would be allowable under the old mandatory scheme and then to go through much the same exercise to arrive at a reasonable sentence—is redundant." *Id.*

Second, post-*Booker* departures create an abundance of unnecessary remands and largely insignificant appeals. For instance, if a district court misapplies a post-*Booker* departure, the sentencing judge may nonetheless impose exactly the same sentence on remand by exercising his discretion under the now-advisory Guidelines. *Mohammed*, 459 F.3d at 987. While that sentence may still be appealed, it will be the review for reasonableness, and not the validity of the departure that governs. *Id.*

Moreover, any preserved mistake in departing remains subject to harmless error review. *Id.* If a mistaken departure were made, so long as the ultimate sentence were reasonable, it would presumably be harmless. *Id.* But if it were not reasonable, a reviewing court would strike it down as both unreasonable and fraught with error. *Id.* In any event, the "review

of the so-called departure would have little or no independent value." *Id.*; *see also Hawk Wing*, 433 F.3d at 633 (Loken, C.J., concurring) ("[T]his approach unduly complicates our appellate task and may compel a significant number of essentially meaningless remands."). Accordingly, the Seventh and Ninth Circuits correctly hold that departures in federal sentencing have been rendered obsolete.

The Seventh Circuit committed error by ignoring the district court's use of departure methodology and failing to order a limited remand. Its mistake was simple, but the chronology detailed. The district court sentenced the Petitioners at the low end of the guideline range while denying them any "departure" from that range. Rosby Sentencing Transcript at 119:15-20. Before hearing the Petitioners' appeal, the Seventh Circuit decided *Johnson*, which made clear that the use of departures in federal sentencing was "obsolete." 427 F.3d at 426. Eight months after it decided *Johnson*, the Seventh Circuit heard the Petitioners' appeal. Appendix, 1(a). Surprisingly, however, it essentially ignored *Johnson* and dismissively found no error in the district court's use of departure methodology. *Id.* at 11a-12a. This decision was fundamental error.

Since *Booker*, some confusion exists over how to apply plain error doctrine to appeals from sentences rendered when the Guidelines were mandatory. *Compare United States v. Hughes*, 396 F.3d 374, 381 (4th Cir. 2005) (pre-*Booker* sentences are now "no doubt" plain error); *United States v. Oliver*, 129 Fed. Appx. 210, 212-13 (6th Cir. 2005) (categorically remanding every sentence imposed before *Booker*) *with United States v. Rodriguez*, 398 F.3d 1219, 1301 (11th Cir. 2005) ("where the effect of an error in the district court is uncertain or indeterminate the appellant has not met his burden of showing" plain error).

The Seventh Circuit has opted for the "middle way" and concluded that the best method for determining whether the kind of plain error argued in such cases has actually occurred is to simply ask the district judge. *United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005). The Seventh Circuit does this by retaining jurisdiction over a limited remand that allows the sentencing judge to determine whether he would (if required to resentence) reimpose the original sentence. *Id.*; *cf. United States v. Crosby*, 397 F.3d 103, 119 (2d Cir. 2005) (adopting limited remand but relinquishing jurisdiction to district court to vacate if necessary). In other words, when dealing with citizens' lives, the Seventh Circuit prefers certainty to conjecture.

Indeed, the Seventh Circuit has extended its disdain for speculation to its review of sentences rendered *after* as well as before *Booker*. *See United States v. Grigg*, 442 F.3d 560, 566 (7th Cir. 2006). In *Grigg*, the defendant pled guilty before *Booker* but was sentenced after that decision. *Id.* at 562. Given the nature of his crime (child pornography), 18 U.S.C. § 3553(b)(2)—the section immediately following the one that *Booker* nullified (§ 3553(b)(1))—controlled the relevant sentencing provisions (the PROTECT Act and the Feeney Amendment). *Id. Booker*, however, did not address whether the sentencing restrictions governed by § 3553(b)(2) were equally unconstitutional. *Id.* at 563. Thus, the Seventh Circuit initially examined "whether *Booker's* rationale for excising § 3553(b)(1) also extend[ed] to § 3553(b)(2)." *Id.* at 564. The court said it did. *See id.* (holding that § 3553(b)(2) "violates the Sixth Amendment by mandating a sentence within the range recommended by the Sentencing Guidelines. It was precisely this requirement that the Supreme Court found constitutionally objectionable in *Booker*.").

Next, the court turned its attention to the sentencing judge's remarks. *Grigg*, 442 F.3d at 565. It found those remarks "inconsistent":

> [A]lthough the court stated at the hearing's outset that it would 'consult' the Sentencing Guidelines when fashioning a sentence under 18 U.S.C. § 3553(a)(2) . . . it later stated that 'Congress has seen fit . . . basically, to prohibit departures from Sentencing Guidelines.' . . . [And] the court seemed to indicate the Feeney Amendment's provisions are mandatory, noting that they 'virtually prohibit judges from departing from the otherwise applicable Sentencing Guidelines.' [For example,] the court indicated in [an] explicit manner that it considered itself bound to apply the Guidelines [by stating that it was] . . . *obliged to impose the minimum sentence under the Guidelines*.

Id. (emphasis in original). The Seventh Circuit concluded "that the district court *may have* plainly erred in treating the Guidelines as binding authority." *Id.* (emphasis in original). It was concerned that while the district court acknowledged the Guidelines were advisory, it was nonetheless unclear because it also asserted that the Feeney Amendment prohibits discretionary sentences outside the Guideline range. *Id.* Accordingly, the Seventh Circuit ordered a "limited remand" pursuant to *Paladino*. *Id.* at 566; *see also United States v. Smith*, 2006 WL 2457462 *4-6 (7th Cir. Aug. 10, 2006) (as in *Grigg*, sentencing court's inconsistent statements required remand because comments at sentencing suggested it may not have understood it was able to sentence defendant below Guidelines minimum).

For all the more reason here, the Seventh Circuit should have ordered a limited remand. At the outset of its sentencing

decision, the district court stated it "will save the departure ruling until later." Rosby Sentencing Transcript at 111:19-20, 22-25; *see also* Franklin Sentencing Transcript at 11:17-19. It then proceeded to calculate an advisory guideline range of 87-108 months. Rosby Sentencing Transcript at 112-13, 114:16-17; Franklin Sentencing Transcript at 13:4-10.

In so doing, the court accorded "considerable weight" to the advisory guideline range. Rosby Sentencing Transcript at 118:13-14; Franklin Sentencing Transcript at 15:18-21. Then it articulated several of the factors from 18 U.S.C. § 3553(a). Rosby Sentencing Transcript at 118:16-119:5; Franklin Sentencing Transcript at 15:22-16:7. Finally, after reiterating that it would give "considerable weight" to the Guidelines in determining an appropriate sentence (Rosby Sentencing Transcript at 119:13-14), the district court stated:

> Even though *departure* is authorized in this case, in the exercise of its discretion, the Court will not *depart*, because, I believe, *departure* is not warranted under the facts and circumstances of this case.

Rosby Sentencing Transcript at 119:15-20 (emphasis added); *see also* Franklin Sentencing Transcript at 16:15-18.

On appeal, the Seventh Circuit essentially disregarded this use of the prohibited methodology. Instead, it equated the judge's use of the now-obsolete system to a matter of semantics:

> Since 1987 judges have been explaining their sentences in terms of departures (or decisions not to depart) from the Guidelines. Habits take time to shake off; it is inevitable that some of the old terminology will linger for a few years. Unless there is reason to think that the choice of words made a

> substantive difference, there is no error at all, let alone a 'plain' error.

Appendix, 11a. Then it characterized the judge's actions as merely responsive: "The judge used the word 'departure' to explain why he was denying a motion for a departure."[3] *Id.* at 12a.

This decision, however, was wrong. Error is plain when the petitioner demonstrates that an error has occurred, plain in nature, and so seriously affecting his substantial rights that the Court's discretion is needed to protect the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 723-35 (1993); *United States v. Julian*, 427 F.3d 471, 481 (7th Cir. 2005).

First, an error occurs when, as here, the court strays from a legal rule that has not been waived. *Olano*, 507 U.S. at 732-33. While *Booker* had been decided three months before sentencing, the Seventh Circuit did not rule departure methodology obsolete until *Johnson*, six months after sentencing, which was during the pendency of Petitioners' appeal. 427 F.3d at 426. Contrary to the Seventh Circuit's assertion, by the date of Petitioners' appeal "it *was*... error for the judge to talk (and perhaps to think) in terms of departures." Appendix, 11a (emphasis added).

Second, an error is considered "plain" when, as here, it is "clear" or "obvious" in the record. *Olano,* 507 U.S. at 734. The

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3. The only reason there was a departure motion at all was because departure methodology was very much in force in 2003, when the Petitioners filed their departure motions. The Petitioners filed those motions not only before *Booker*, but even before *Blakely v. Washington*, 542 U.S. 961 (2004), the ideological underpinning for *Booker*. In fact, it was not at all clear that departure methodology was obsolete in the Seventh Circuit until it decided *Johnson*, about six months after sentencing in this case.

Seventh Circuit itself recognized that the district court's ruling was issued after *Booker* and before *Johnson*. Appendix, 11a. Yet despite its continuing practice of clarifying the obsolescence of departure methodology,[4] the Seventh Circuit expected clairvoyance from the district court and Petitioners literally months before it decided *Johnson*. *See id.* ("Although sentence was imposed after *United States v. Booker*, which made the departure terminology obsolete, defendants did not object to the judge's explanation.").

As explained above, there is still a split of authority regarding whether post-*Booker* departures are valid. "It is hardly sporting" for a reviewing court to fault a litigant for failing to anticipate an interpretation that remains disputed over a year after its birth. *See id.* at 12a ("The defendants own motions had asked the judge to 'depart' from the Guideline range!"). "An invited error," as Judge Easterbrook called it, is no less clear than an accidental one; especially when requested and reached in good faith and in accordance with then-current law. *Id.*

Third, when the Petitioners, as here, establish that the error was not only prejudicial, but would result in a miscarriage of justice if not remedied, then the court's discretion should be employed to grant relief. *Olano,* 507 U.S. at 734. The "first element merely requires prejudice, in the sense that the [outcome] may have been different, whereas the second requires confidence that if the error is not corrected the result will be intolerable, such as . . . subjecting a guilty person to an illegally

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4. *See, e.g., United States v. Howard*, 454 F.3d 700, 703 (7th Cir. 2006); *United States v. Hewlett*, 453 F.3d 876, 881 (7th Cir. 2006); *United States v. Walker*, 447 F.3d 999, 1006 (7th Cir. 2006); *United States v. Laufle*, 433 F.3d 981, 986 (7th Cir. 2006); *United States v. Arnaout*, 431 F.3d 994, 1003 (7th Cir. 2005).

long sentence." *Paladino*, 401 F.3d at 481 (citing *Olano*, 507 U.S. at 734-35).

Here, the Petitioners' rights were prejudiced because the district court's sentence may have been different after *Johnson*. The Seventh Circuit acknowledged this possibility when it qualified its holding by stating, "Unless there is reason to think that the choice of words made a substantive difference." Appendix, 11a. The district court's choice of words easily could have made a substantive difference because it analyzed Mr. Rosby's diminished capacity and Mr. Franklin's family circumstances in terms of the far more rigorous departure methodology, rather than the far more fluid § 3553(a) factors.[5] Although those were not "forbidden" factors under the traditional guideline departure methodology, *see* U.S.S.G. 5K2.0(d), they were very difficult departures to get. *See, e.g., United States v. Ferron*, 357 F.3d 722, 725 (7th Cir. 2004) (affirming denial of downward departure based on diminished capacity); *United States v. Cruz-Guevara*, 209 F.3d 644, 648 (7th Cir. 2000) (vacating and remanding district court's downward departure based on family circumstances).

Thus, even if those considerations might not have been enough to constitute grounds for a downward departure under guideline policy statement § 5K2.13, they might very well have constituted the "history and characteristics" justifying a sentence below the advisory guideline range under § 3553(a). In any event, the Seventh Circuit could not have been confident that the district court would have given the same sentence with the benefit of knowing that departures were "obsolete."

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5. Arguments concerning Mr. Rosby's diminished capacity were presented to the district court before and during sentencing. *See, e.g.*, Rosby Sentencing Transcript at 94:4-97:2. Mr. Franklin submitted a motion for downward departure based, among other things, on family circumstances. Franklin Downward Departure Motion.

In fact, this uncertain result is precisely the "miscarriage of justice" that the Seventh Circuit sought to avoid when reviewing pre-*Booker* sentences under the now advisory Guidelines in *Paladino*:

> [U]nless any of the judges in the cases before us had said in sentencing a defendant pre-*Booker* that he would have given the same sentence even if the guidelines were merely advisory . . . , it is impossible for a reviewing court to determine *without consulting the sentencing judge* . . . whether the judge would have done that.

401 F.3d at 482-83 (emphasis in original). In *Paladino*, a significant legal rule had changed between the time of sentencing and appeal: Once mandatory guidelines had become advisory. In the Seventh Circuit's view, this left in doubt sentences imposed before the rule change. To ensure the propriety of those sentences, it ordered limited remands to see if the district courts would have imposed the same sentences had they known the Guidelines were advisory rather than mandatory.

That same logic applies here. Between sentencing and appeal a significant legal rule had changed (at least in the Seventh Circuit): the obsolescence of departures. In the absence of an express indication that the district court would have given the same sentence without departure analysis, it was impossible for the Seventh Circuit "to determine without consulting the sentencing judge . . . whether [he] would have" reached the same result. *Paladino*, 401 F.3d at 482. This uncertainty is intolerable because if the district judge would have imposed a lesser sentence on Petitioners "had he not thought himself bound" by

departure analysis, "this error in having thought himself bound may have precipitated a miscarriage of justice." *Id.* Indeed:

> [t]o tell [the] defendant[s] we know your sentence would have been . . . shorter had the district judge known [departures were obsolete] . . . , but that is your tough luck and you'll just have to stew in prison for . . . additional months . . . would undermine the fairness, the integrity, and the public repute of the federal judicial process.

Id. Simply put, it is just as much "a miscarriage of justice to give a person an illegal sentence that increases punishment, . . . as it is to convict an innocent person." *Id.* In *Grigg*, the Seventh Circuit applied this fundamental principle to uncertainty in post-*Booker* sentencing. 442 F.3d at 565. The Seventh Circuit was wrong not to apply it here. Therefore, the Seventh Circuit erred by ignoring the district court's use of departure methodology and failing to order a limited remand.

CONCLUSION

For the reasons set forth above, Petitioners Thomas J. Rosby and John M. Franklin respectfully request that this Court grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JULY 19, 2006

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

Nos. 05-2270 & 05-2483

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS J. ROSBY and JOHN M. FRANKLIN,

Defendants-Appellants.

Argued June 2, 2006—Decided July 19, 2006

Before POSNER, EASTERBROOK, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Monon Corporation once was among the largest manufacturers of over-the-road semi-trailers, containers, and container chassis, producing about 150 units a day. Early in 1996, however, Monon's principal customer cut back on orders and the lost business could not be replaced. Production fell to about 100 units a day in January 1996, dropping to 60 in April and 50 in August. This decline in sales produced a liquidity crisis, as the firm's

fixed obligations and payroll could not be cut as fast as the order book shriveled. Thomas Rosby, Monon's CEO and holder of 72% of its equity, and John Franklin, its CFO and holder of 14%, watched the finances closely.

Much of Monon's working capital came from Congress Financial Corporation, a factor that advanced credit on the security of Monon's inventory and receivables. Monon could draw on the credit as soon as it started production of each new unit. During 1996 Monon began a bill-ahead fraud. It would, for example, report starting 60 units on a day when only 50 actually entered production. As sales continued to decrease, however, Monon had to report more and more early starts, so that it could retire older advances. Congress was left unsecured for the difference between actual and reported production. The unsecured draw against the revolving credit increased from about $2 million in March 1996 to $5.9 million in August, when Congress discovered the fraud. After Monon filed for bankruptcy on September 1996, Congress completed many of the falsely reported units at its own expense and risk. Its net loss was about $1.8 million.

Monon also borrowed from A.I. Credit Corporation and Anthem Premium Finance. These firms made loans that Monon was supposed to use to prepay insurance policies; Monon agreed to retire the loans with monthly payments roughly equal to the cost of insurance for that month, and the balance was secured by the policies' cash value. (For simplicity we refer to all of this as "insurance" even though some workers' compensation coverage was arranged through other devices.) If, for example, Monon secured workers' compensation coverage for $5 million a year, the premium

finance company would advance that money; the unearned portion of the premium (that is, the premium attributable to future months) would be returned if Monon should cancel the policy and thus could be used as security for the loans. During 1996 Monon reported making larger prepayments than it actually had done. This left A.I. Credit and Anthem unsecured for the difference, and after Monon's bankruptcy Anthem was saddled with net losses of about $4.9 million and A.I. Credit about $2 million.

A grand jury charged Rosby and Franklin with mail and wire fraud for making (or causing to be made) the misrepresentations that persuaded the lenders to advance funds without the promised security. Michael Peterson, Monon's insurance broker, was indicted at the same time and pleaded guilty; he testified for the prosecution. Following the jury's guilty verdict, both Rosby and Franklin were sentenced to 87 months in prison plus restitution of about $8.7 million (the sum of the three lenders' net losses).

Defendants' principal arguments in this court collapse to a single contention: that the false representations were not material because, by making prudent inquiries, the lenders could have figured out what Monon was doing. (To the extent defendants maintain that they did not know what the lenders were being told, the jury's contrary conclusion is unimpeachable.) They do not contend that the jury was bound to find that the lenders *actually* understood the truth, and they did not ask for an instruction presenting the knowledge question to the jury, but they do say that even taken in the light most favorable to the prosecution the evidence compels a conclusion that cautious lenders ought to have done more,

or better, checking, and that these inquiries would have turned up the truth.

This line of argument starts with *Neder v. United States*, 527 U.S. 1, 20-25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), which held that materiality is an element of the mail-fraud offense under 18 U.S.C. § 1341. The Court observed that "fraud" is a staple term of the common law and should be read to include its common-law constituents, including materiality, unless Congress provides otherwise (which it did not in § 1341). See also, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976) (securities fraud entails proof of scienter, because this is required at common law); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) (discussing the materiality requirement); *Dirks v. SEC*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983) (drawing on common law to conclude that securities fraud entails proof of duty to disclose). Having established that materiality is essential, defendants maintain that at common law a party cannot close his eyes to a known risk or act with indifference to that risk but must make reasonable attempts at self-protection. (For this proposition defendants cite only cases in the Illinois state courts; the significance of that choice will become clear later.) According to defendants, some of the lenders' employees had their suspicions yet failed to follow up. This means, defendants insist, that the representations were not material.

Defendants recognize that under other federal statutes a representation may be material even though the hearer strongly suspects that it is false. A witness commits the crime

of perjury, for example, if he lies under oath about a subject important to the proceeding, even though the grand jury believes that it knows the truth. *United States v. Kross*, 14 F.3d 751, 755 (2d Cir.1994); *United States v. Goguen*, 723 F.2d 1012, 1019 (1st Cir.1983); *United States v. Richardson*, 596 F.2d 157, 165 (6th Cir.1979). See also, e.g., *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991) (that grand jury already thinks it knows the truth is no defense to a subpoena, for evidence may be material if it can corroborate or refute existing beliefs); *Kungys v. United States*, 485 U.S. 759, 776-80, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988) (false statement to immigration officials violates 8 U.S.C. § 1451(a) even if agency readily could have discovered the truth); *United States v. Whitaker*, 848 F.2d 914, 918 (8th Cir.1988) (material false statement to investigating agency violates 18 U.S.C. § 1001 even if agency knows the truth). A representation is material if it has a tendency to influence the decision of the audience to which it is addressed. See *Neder*, 527 U.S. at 22-23, 119 S.Ct. 1827, citing Restatement (2d) of Torts § 538 (1977); *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988). By referring to the common law, however, *Neder* departed from the approach of perjury and other false-statement statutes by imposing on the audience a duty to investigate for its self-protection-or so defendants maintain.

This confuses materiality with reliance. At common law, *both* materiality (in the sense of tendency to influence) and reliance (in the sense of actual influence) are essential in private civil suits for damages. That's why, if the issuer of securities furnishes an investor with the truth in writing, the

investor cannot claim to have been defrauded by an oral misrepresentation: whether the writing actually conveys the truth or just calls the oral statement into question, the investor is on notice. See, e.g., *Acme Propane, Inc. v. Tenexco, Inc.*, 844 F.2d 1317 (7th Cir.1988). It is also why an investor's disclaimer of reliance on certain representations, as part of a declaration that the investor has done and is relying on his own investigation, defeats a private damages action for securities fraud. See, e.g., *Rissman v. Rissman*, 213 F.3d 381 (7th Cir.2000); *Jackvony v. RIHT Financial Corp.*, 873 F.2d 411, 415-17 (1st Cir.1989) (Breyer, J.); *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1283, 1286-87 (D.C.Cir.1988) (R.B. Ginsburg, J.).

Reliance is not, however, an ordinary element of federal criminal statutes dealing with fraud. *Neder* so holds for *§ 1341* in particular. "[T]he Government is correct that the fraud statutes did not incorporate *all* the elements of common-law fraud. The common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal fraud statutes." 527 U.S. at 24-25, 119 S.Ct. 1827 (emphasis in original). Once the Supreme Court excludes reliance as a separate element of the mail-fraud offense, it will not do for appellate judges to roll reliance into materiality; that would add through the back door an element barred from the front. Reliance is not an aspect of the materiality element in mail-fraud prosecutions. Accord, *United States v. Fernandez*, 282 F.3d 500, 508 (7th Cir.2002); *United States v. Gee*, 226 F.3d 885, 891 (7th Cir.2000).

Appendix

Defendants do not argue that by extending credit, despite Monon's noncompliance with some of the contracts' written terms, the lenders agreed to modify their arrangements and forego the promised security. Maybe such an argument has been withheld because those employees of the lenders who suspected (or should have suspected) what was afoot lacked authority to change the deal. Episodes modeled on Potemkin villages suggest as much: whenever lenders' senior personnel or auditors called to check on their collateral, Monon scurried to convey the appearance (though not the reality) of extra production starts or insurance with cash value. That Monon continued making misrepresentations demonstrates its belief that truth would have altered its creditors' behavior. Low-level employees' interests may not have been aligned with those of the lenders' investors; employees paid by the hour, or by the amount of credit under their purview, may be inclined to avert their gaze lest they learn of problems, for the costs fall elsewhere. At all events, defendants do not argue that any employee of the lenders with actual authority to approve a change in the contracts' terms by reducing the amount of collateral ever had actual knowledge of what Monon was doing. (Cindy Carroll, a branch manager who knew that A.I. Credit had advanced too much against Monon's 1995 insurance premiums-the principal event that defendants say should have alerted lenders not to trust what Monon was saying in 1996-never told John Rago, A.I. Credit's vice president of credit and the only person authorized to make lending decisions on its behalf.)

As for defendants' argument that the prosecutor violated the due process clause by withholding exculpatory evidence, see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10

L.Ed.2d 215 (1963): the evidence was not even relevant, let alone exculpatory. Before we take this up, however, there is a jurisdictional detour. Before their sentencing both Rosby and Franklin filed motions seeking new trials because of the non-disclosures. The sentencing occurred as scheduled in April 2005; the district court entered final judgments without mentioning the motions. Some months later, however, while the appeals were pending, the district judge entered an order denying the motions. Defendants did not file new notices of appeal, and the United States contends that this lapse deprives us of jurisdiction.

A district court's action on a *Rule 33* motion for a new trial filed *after* sentencing is a new final decision that requires a new notice of appeal. See, e.g., *United States v. Hocking*, 841 F.2d 735, 736 (7th Cir.1988). But a new-trial motion filed before sentencing must be resolved before sentencing as well. Under the Sentencing Reform Act of 1984 and Fed.R.Crim.P. 35, a district judge lacks authority to retain control of a criminal case for more than seven days after imposing sentence. See *United States v. Smith*, 438 F.3d 796 (7th Cir.2006). Any pre-sentencing motions must be resolved at or before sentence is imposed-for otherwise the sentence is not a final judgment and the defendants will be frustrated in their attempts to appeal it, at the same time as the district judge retains an unauthorized measure of control over events after sentencing. If the district judge neglects to rule on pending motions, we treat all as denied automatically by the imposition of sentence. See *United States v. Van Wyhe*, 965 F.2d 528, 530 n. 2 (7th Cir.1992). That understanding ends the district judge's role when sentencing occurs, as the Sentencing Reform Act demands, and ensures that the

judgment is final so that defendants may press their contentions in a new forum. It also means that there is never a need for an additional notice of appeal to contest rulings (or inaction) on pre-sentencing motions. The district court lost its authority over these cases when the sentences were imposed, and the defendants' notices of appeal brought up all issues-including those that the district court failed to address before sentencing.

Brady offers the defendants no assistance, however. They complain that the prosecutor withheld two tidbits that did not come out until shortly before sentencing: first, Anthem Insurance Company had insured the loans that Anthem Premium Finance, its subsidiary, had made to Monon; second, in July 1996 the parent corporation sold its stock in the premium-finance subsidiary to Newcourt Credit Group USA, Inc. How either of these facts could assist the defendants eludes us. That the victim was insured does not make the loss any less; who ultimately bears a loss does not matter in a fraud prosecution. A bank executive who embezzled from his employer could not defend by noting that the bank had been reimbursed by an insurer; no more does reimbursement matter here.

Defendants tell us that the impending sale gave Anthem (the parent) a reason to want its subsidiary to build up its book of business, to make the subsidiary more attractive, and that the subsidiary therefore ignored the risks of nonpayment. But the insurance issued by the parent corporation makes hash of this contention; why would a parent want a subsidiary to throw away money that the parent would have to repay in order to make the subsidiary (and

thus Newcourt) whole? Anyway, the possibility that Anthem may have been trying to bamboozle Newcourt does not provide a defense for fraud committed *against* Anthem. Nor does this explain why Congress and A.I. Credit were taken in. Anthem behaved no differently from the other victims. To return to our theme: Defendants do not contend that the record demonstrates Anthem's *actual knowledge* that Monon's representations were false; arguments pro and con about how attentive the lenders' staff may have been to the possibility that Monon was lying are not relevant, because reliance is not an element of the mail-fraud offense.

Defendants' remaining arguments about the convictions do not require discussion, so we arrive at sentencing. The loss calculation was correct-in particular, the district judge rightly concluded that the loss Congress suffered was $5.9 million (the unsecured advances outstanding when the fraud came to light) rather than $1.8 million (Congress's net loss after it took over Monon's production in bankruptcy in order to minimize its injury). As a result the total loss exceeded $10 million and defendants received the increase provided by U.S.S.G. § 2F1.1(b)(1)(P) (1995). (By the parties' agreement the district court used the 1995 Guidelines. Whether this was appropriate is a question that the parties have not addressed. See *United States v. Roche*, 415 F.3d 614, 619 (7th Cir.2005).) When the intended loss exceeds the realized loss, the former prevails under the Guidelines. See § 2F1.1 Application Note 7(b). Congress took an economic risk after Monon's bankruptcy by producing additional units, and it made a profit; there's no reason why Rosby and Franklin should benefit by Congress's entrepreneurial activity, which does not diminish the seriousness of their offense.

After calculating a sentencing range according to the Guidelines, the district judge stated: "Even though departure is authorized in this case, in the exercise of its discretion, the Court will not depart, because, I believe, departure is not warranted under the facts and circumstances of this case." Although sentence was imposed after *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which made the departure terminology obsolete, see *United States v. Laufle*, 433 F.3d 981, 986-87 (7th Cir.2006); *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir.2005), defendants did not object to the judge's explanation. Now, however, they contend that it was plain error for the judge to talk (and perhaps to think) in terms of departures. *Booker* gives district judges more discretion than the old departure framework did; to ensure that the district judge knows about and uses this discretion, defendants insist, they must be resentenced.

Yet there is no doubt that the district judge knew about *Booker* (which had been decided more than three months before sentencing) and its significance. The judge discussed not only the Guidelines but also the sentencing criteria in 18 U.S.C. § 3553(a). Since 1987 judges have been explaining their sentences in terms of departures (or decisions not to depart) from the Guidelines. Habits take time to shake off; it is inevitable that some of the old terminology will linger for a few years. Unless there is reason to think that the choice of words made a substantive difference, there is no error at all, let alone a "plain" error-which entails a serious risk that an injustice has been done. See *United States v. Olano*, 507 U.S. 725, 734-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Dominguez Benitez*, 542 U.S. 74, 80-84, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004). It is hard to see how the

terminology mattered-and easy to see why the district judge discussed departures. The defendants' own motions had asked the judge to "depart" from the Guideline range! The judge used the word "departure" to explain why he was denying a motion for a departure. It is hardly sporting for someone who invites a judge to use a word to complain after he does so. An invited error does not work to the benefit of the litigant who issued the invitation. The 87-month sentences are reasonable, so there is no basis for resentencing.

Restitution is the final issue. The judge ordered defendants to reimburse the lenders for their net losses. Here, at last, reliance could be important-for restitution is fundamentally a civil remedy administered for convenience in the criminal case, see *United States v. George*, 403 F.3d 470, 473 (7th Cir.2005), and as we have mentioned reliance is essential to damages for fraud in private litigation. For one last time, therefore, we reiterate that defendants have not even argued that the people who made business decisions on behalf of the lenders had actual knowledge that Monon was lying about its production starts or insurance purchases.

Lenders and other investors need not look behind representations made to them. See, e.g., *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522 (7th Cir.1985); *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540 (7th Cir.1990); *In re Mayer*, 51 F.3d 670 (7th Cir.1995). Fraud is an intentional tort, and the common law does not require victims of intentional torts to take precautions. See Restatement (2d) of Torts § 481 (1965). Telling the truth is cheap, while nosing out deceit is expensive. Requiring all lenders, investors, and so on to

investigate every representation made to them would be extravagantly wasteful, compared with a legal regime that unconditionally requires speakers to tell the truth on every material topic if they speak at all. Thus investors' gullibility and carelessness do not excuse wilfully false statements or reduce the damages available to the victims. "The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Restatement (2d) of Torts § 540 (1977). That rule makes promises credible by making it costly for liars to escape liability later. This gives truth-tellers a commercial advantage, for their costs of doing business are lower than the liars' costs.

A reliance requirement prevents recovery when the truth is known or the risk of an investment (or loan) is apparent; a risky investment that goes bad differs from fraud. See *Mayer*, 51 F.3d at 676. Our opinion in *Angelos* discusses several decisions in Illinois that appear to treat the reliance requirement as obliging investors to investigate the veracity of representations made to them, as a condition of obtaining damages for fraud. This, we assume, is why defendants concentrate on Illinois law when discussing what "the" common law requires in fraud actions. Yet *Angelos* concluded that Illinois appears to be an outlier (if investigation really *is* essential in Illinois, whose case law is not uniform on the issue); we held that such a requirement would not be incorporated into federal law. It would be no more appropriate to do so in a mail-fraud action than in a securities-fraud action. So the restitution award is appropriate under civil-fraud principles.

Affirmed.